

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA

- - - - - X  
UNITED STATES OF AMERICA, :  
: Plaintiff, :  
: :  
vs. : :  
: Criminal No. 4:15-cr-103  
: :  
JESSE R. BENTON, JOHN M. :  
TATE, DIMITRIOS N. KESARI, : HEARING TRANSCRIPT  
: :  
Defendants. :  
- - - - - X

Chambers, Fourth Floor  
U.S. Courthouse  
123 East Walnut Street  
Des Moines, Iowa  
Monday, August 17, 2015  
10:30 a.m.

BEFORE: THE HONORABLE HELEN C. ADAMS, Magistrate Judge

- - -

THERESA KENKEL - CERTIFIED SHORTHAND REPORTER

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1                   P R O C E E D I N G S

2                   THE COURT: Good morning. This is Judge Adams. And  
3 who do I have on the phone on behalf of the Government this  
4 morning?

5                   MR. KRAVIS: Good morning, Your Honor, Jonathan  
6 Kravis and Richard Pilger on behalf of the United States, and I  
7 will be arguing the motions for the Government.

8                   THE COURT: All right. Thank you, Mr. Kravis.

9                   And then who do I have on the line on behalf of  
10 Defendant Benton?

11                  MR. HOWARD: Good morning, Your Honor. This is Roscoe  
12 Howard, and I'm here with Meena, M-e-e-n-a, Sinfelt,  
13 S-i-n-f-e-l-t.

14                  THE COURT: All right. Thank you.

15                  And then do we have anybody on the line on behalf of  
16 Defendant Tate?

17                  MR. WARRINGTON: Yes, Your Honor. This is David  
18 Warrington, W-a-r-r-i-n-g-t-o-n, and I have with me Paris  
19 Sorrell, S-o-r-r-e-l-l.

20                  THE COURT: All right. Thank you.

21                  And how about on behalf of Defendant Kesari?

22                  MR. BINNALL: Good morning, Your Honor. Jesse  
23 Binnall, last name is B-i-n-n-a-l-l, and I'm joined here by  
24 Susannah Smith.

25                  THE COURT: Thank you.

1                   Do I have anybody else that I missed by any chance?

2                   MR. COOK: Your Honor, this is Guy Cook here on behalf  
3 of Google, as well as John Roche, who I put on a motion for pro  
4 hac vice last week.

5                   THE COURT: I'm sorry, Mr. Cook. You went out a  
6 little bit there. Who's with you?

7                   MR. COOK: John Roche who I put a motion on for pro  
8 hac vice admission last week with my appearance.

9                   THE COURT: All right. Thank you.

10                  All right. We do have a couple of motions that I  
11 wanted to talk with you about, and to give you all an  
12 opportunity to make a record.

13                  Can you hear me okay? I can hear some feedback.

14                  MR. COOK: We're hearing you fine, Your Honor.

15                  THE COURT: All right. I want to give you all an  
16 opportunity to make a record with respect to the motions. So  
17 let me just indicate what we have here, and I'll tell you what  
18 I've had an opportunity to review as well.

19                  I have a motion that the Government filed. I have the  
20 Government's motion to compel immediate production and to show  
21 cause why Google should not be held in contempt, and that motion  
22 was filed on 8-3.

23                  I have Google's resistance to that motion. That was  
24 filed on 8-14. I also have with that, related to that same  
25 motion--let me just make sure here. I also have the

1 Government's reply with respect to that motion as well.

2                   So you all know exactly what I have, and what I've had  
3 an opportunity to, at least, briefly review before our call this  
4 morning, but I wanted to get the call on early this week, given  
5 the status of the proceedings, so that we could keep things  
6 moving.

7                   I also have a motion for temporary relief from the  
8 order denying the motion to quash the search warrant, and that  
9 one was filed on 8-12. And I have the Government's opposition  
10 to that motion for temporary relief.

11                  And then lastly I have the Government's motion for a  
12 protective order that was filed on 8-13. I have the defendants',  
13 Benton, Tate, and Kesari's, opposition to that motion for a  
14 protective order, and I also have the Government's reply to that  
15 opposition. And both of those last two documents were filed on  
16 8-14.

17                  I think maybe what makes sense, and I'll give you guys  
18 an opportunity if you have a different order that you think  
19 makes sense, I think what might make sense for me would be for  
20 the parties to maybe argue the motion for temporary relief  
21 first, and then we can have the parties do any additional  
22 argument that they would like to do with respect to the other  
23 two motions filed by the Government.

24                  Does that order make sense to all of you?

25                  MR. KRAVIS: Yes, that's fine for the Government.

1 Thank you.

2 MR. COOK: That's fine with us, Your Honor.

3 THE COURT: All right. Well, let's go ahead and do  
4 that, then. We'll go ahead and have argument from the parties  
5 with respect to the motion for temporary relief from the order  
6 denying the motion to quash the search warrant.

7 So, Mr. Howard, is that going to be you?

8 MR. HOWARD: That will be me, Your Honor.

9 THE COURT: All right. Go ahead.

10 MR. HOWARD: Your Honor, initially I think what we  
11 have in our filings are sufficient, but things to point out,  
12 Google had attached to its motion communication from Karen  
13 LoStracco, a Government FBI agent, and clearly they had  
14 permission to contact us given to them by the Government. So  
15 the Government's representations that they didn't know how we  
16 were contacted were simply misrepresentations to the Court.

17 With that, it's clear that under 2704 we have--first,  
18 Google, under 2704(a)(4)(A), clearly can resist. But more  
19 importantly for this motion, under 2704(a)(5)(B), we have the  
20 absolute right to challenge it, and we have the absolute right  
21 to challenge an order. And that is something we actually  
22 pointed out in our earlier motions, it's something that the  
23 Government continually refers to. But clearly us not knowing,  
24 and the Government not being forthcoming and letting folks know  
25 that they had given permission to Google under 2704 to go

1 forward and notify us, we relied on what we still think is the  
2 ultimate statute, and that is the Fourth Amendment. And we do  
3 have the right to be secure in our personal effects, we do have  
4 the right to have a search warrant that is supported by probable  
5 cause.

6 According to 2704(b) we have 14 days from your order  
7 to appeal, which we are intending to do. We think the right is  
8 there. It is--the statute makes it clear, the Fourth Amendment  
9 makes it clear, and we should be allowed to go forward, then.  
10 We will try to do that with as much haste as possible.

11 THE COURT: Mr. Howard, I don't have a copy of the  
12 order in front of me. Can you tell me what that--do you know  
13 what the deadline would be for that 14-day period? I just don't  
14 have that in front of me here.

15 MR. HOWARD: Hold it. I have it.

16 THE COURT: Okay. Thank you.

17 MR. HOWARD: Your Honor, I think your--hold it. We  
18 believe the date will be the 24th, Your Honor.

19 THE COURT: Okay. So that's next Monday.

20 MR. HOWARD: Yes, ma'am.

21 THE COURT: Okay. All right. Thank you.

22 Okay. With respect to the Government's position,  
23 then, Mr. Kravis, are you ready?

24 MR. KRAVIS: Yes. Thank you, Your Honor. I just  
25 wanted to make two brief points in support of the Government's

1 position. The first is that the Government in its pleadings is  
2 not alleging that Google or Mr. Benton did anything wrong with  
3 respect to the handling of these warrants. So to the extent  
4 that Google, for example, in its pleadings, or Mr. Benton in his  
5 pleadings, argues about the propriety of not producing the  
6 documents, in light of the litigation the Government is not  
7 disputing any of that. And the purpose of the Government's  
8 pleadings in this matter is not to ask the Court to rule on the  
9 propriety of Google's conduct to this point. It is, instead,  
10 just to get the documents that we believe we're entitled to  
11 under the warrant.

12 The second point I wanted to make was that the only  
13 real argument that either Mr. Benton or Google makes in support  
14 of the motion for temporary relief is that Mr. Benton will  
15 suffer some sort of irreparable harm if the Court denies the  
16 motion for temporary relief and allows the Government to execute  
17 the warrant on Google because then the Government will already  
18 have--will have access to the records, and Mr. Benton will not  
19 be able to unring the bell, so to speak.

20 And the reason that is not a persuasive argument, and  
21 the reason that this Court should not grant a stay based on that  
22 argument is that this motion to quash, motion to stay  
23 litigation, is just not a proper procedural vehicle for  
24 Mr. Benton to obtain relief. As the Government has argued over  
25 and over again, Mr. Benton just does not have the lawful

1 authority to ask the Court to quash a warrant that has been  
2 signed by another judge who has found probable cause and found  
3 that the warrant is otherwise lawful. And the Government cited  
4 in support of that position, among other cases, the recent  
5 Supreme Court case of United States versus Grubbs.

6 I think the law is clear that Mr. Benton's remedy at  
7 this point is to file a motion to suppress in the criminal case.  
8 And while it is true that a motion to suppress means that the  
9 Government will be allowed to execute the search warrant and  
10 obtain the documents, that is just how search warrants work, and  
11 there is nothing particularly uncommon or unusual about that.

12 Mr. Benton's upfront protection is the Fourth  
13 Amendment's requirement that the Government obtain a warrant  
14 based on probable cause, which it's done. But once the  
15 Government's obtained that warrant, Mr. Benton's only remedy is  
16 to file a motion to suppress after the evidence has been  
17 collected.

18 To this point Mr. Benton has had an opening memorandum  
19 in support of his motion, a reply in support of the motion, a  
20 letter brief filed in the Government's motion to unseal, a  
21 motion for temporary relief, and Mr. Benton still has not  
22 managed to cite a single case from any jurisdiction in which a  
23 court did what Mr. Benton is asking this Court to do, which is  
24 to quash a warrant that's already been signed by another judge  
25 for lack of probable cause before the warrant is executed. And

1 the fact that--a court of competent jurisdiction.

2                   And the fact that Mr. Benton cannot find any authority  
3 to support that proposition means that the Court should not  
4 grant the stay when Mr. Benton can't even explain what exactly  
5 it is that he's asking the Court to do, or what his legal basis  
6 is for asking the Court to do it.

7                   A moment ago, and this is the last point I'll make,  
8 Mr. Howard cited 18 USC 2704(a)(5)(B) and claims that that  
9 provision of the Stored Communications Act allows the Court to  
10 quash the warrant. But that is just wrong as we litigate it in  
11 the context of the original motion to quash the warrant.

12                  The Stored Communications Act provides for the  
13 Government to access electronic materials through three  
14 different legal processes: A warrant, a court order, and an  
15 administrative subpoena. And the provision that Mr. Howard  
16 cites says that a subscriber can move to ask the Court to quash  
17 a court order or an administrative subpoena. The provision does  
18 not allow a subscriber to move to quash a warrant, and the  
19 statute is very specific in distinguishing between warrants,  
20 court orders, and administrative subpoenas, and that is not  
21 merely a formalistic distinction.

22                  The Act provides for different levels of proof and  
23 different procedural requirements for the Government to obtain  
24 each of those three orders--or each of those three means of  
25 legal process.

1                   And once the Government has obtained a warrant, which  
2 has the most stringent requirement of probable cause before a  
3 neutral and detached magistrate, a subscriber may not move to  
4 quash the warrant before it is executed. The subscriber's  
5 remedy is a motion to suppress after the fact.

6                   And, of course, the Government agrees with Google,  
7 that as its service provider, Google may come to court and ask  
8 the Court to modify a warrant if the warrant is unduly  
9 burdensome. But just because Google can move to modify a  
10 warrant, that does not mean Mr. Benton can move to quash a  
11 warrant on those grounds.

12                  Thank you.

13                  THE COURT: One question for you, Mr. Kravis. In the  
14 motion that was filed on behalf of Mr. Benton, an alternative  
15 request is that the period of time for the search warrant be  
16 limited to the time period of March 1, 2011, through July 2,  
17 2014, the date the search warrant was served on Google. Can you  
18 tell me what the Government's position is with respect to that  
19 issue?

20                  MR. KRAVIS: Through July 2nd of 2014?

21                  THE COURT: Correct.

22                  MR. KRAVIS: Well, the Government's initial position  
23 is that that issue, the issue regarding the limitations on the  
24 warrant, and the scope of the warrant, was already decided by  
25 Magistrate Judge Shields when he signed the warrant, and that

1 there's no basis now for Mr. Benton to come back and ask another  
2 judge to--with all due respect to Your Honor, to ask another  
3 judge to modify Judge Shields' determination just because  
4 Mr. Benton disagrees with what Judge Shields decided.

5                   If the Court were inclined to revisit the parameters  
6 in the warrant, the Government would--the Government would be  
7 amenable to limiting further the date in the warrant. I would  
8 point out that in this case there are allegations related to  
9 obstruction of justice that go on beyond the dates of the  
10 substantive underlying conduct.

11                   THE COURT: All right. Okay. Thank you.

12                   Mr. Howard, I'll give you a couple minutes if you have  
13 any additional points you wanted to raise with respect to that  
14 motion.

15                   MR. HOWARD: Yeah, Your Honor. And just so you  
16 understand, when we put the dates in there, we were--the warrant  
17 was--said that they had to provide documents up until the date  
18 served, and there was--there was simply no definition of what  
19 that date was. There was no date there. And the date that we  
20 put in there was the date that Google received the warrant. And  
21 so that's the date we think it should be limited to.

22                   I'll also point out that we had just gotten discovery,  
23 and from what we can tell, at one point, Your Honor, we had  
24 given the Government permission to go through our documents. I  
25 ended up rescinding that permission 24 hours after my client had

1 agreed to it. But I will point out that one of the things we  
2 are able to tell from this discovery is that they did do a  
3 search, and their agent not only did a search, but they did a  
4 search of my e-mails. They went through attorney e-mails.

5                   And so, Your Honor, they did not use a taint team.  
6 There is no indication that they have any appreciation for a  
7 taint team. And from what I remember from Mr. Kravis' first  
8 argument, and from what I'm hearing today, basically they're  
9 saying they need to go and want to go through everything and,  
10 essentially, if you will, Your Honor, they want the parameters  
11 of a general warrant.

12                   We understand that Judge Shields has gone through it  
13 once before, but if you--but when you look at 2704, as you look  
14 at the end, 2704(b)(4), they talk about the Court ordering the  
15 process being quashed. They don't talk about anything in  
16 particular. And in this case, obviously you have issued an  
17 order, and then--and so we think 2704 actually is applicable in  
18 this situation.

19                   And, regardless, when you look at the Fourth  
20 Amendment, I certainly don't think Mr. Kravis is suggesting that  
21 the Fourth Amendment be trumped by any case or any--or any other  
22 statute. And it clearly says that we have the right to be  
23 secure in our effects. It doesn't say when we have to look for  
24 redress on a violation of those rights. And usually--he is  
25 right, we don't learn about search warrants. In this case we

1 did, and there is nothing that says we need to sit back under  
2 the Fourth Amendment and wait until those rights are trampled  
3 before we look for some sort of address to them. And so that's  
4 why we're here.

5 THE COURT: Thank you.

6 MR. KRAVIS: I'm sorry. Your Honor, I apologize. May  
7 I be heard briefly on the date range point? I think I had not  
8 correctly understood the question the Court was asking.

9 THE COURT: All right. And this is Mr. Kravis?

10 MR. KRAVIS: Yes. Yes.

11 THE COURT: Go ahead.

12 MR. KRAVIS: I'm sorry, Your Honor. For purposes of  
13 the execution of the warrant, the Government will agree that the  
14 date of execution on the warrant would be the date that the FBI  
15 served the warrant on Google, which I think addresses the point  
16 about the date range. I agree with Mr. Howard on that point.

17 THE COURT: All right. Thank you. I'm just making a  
18 note here. All right.

19 Why don't we go ahead and talk about the Government's  
20 motions, then. And, Mr. Kravis, I'm going to let you go ahead  
21 and start that, and you can discuss them together, or whatever  
22 you think makes the most sense from your perspective, and then  
23 I'll let the other parties respond, okay?

24 MR. KRAVIS: Yes, Your Honor.

25 On the Government's motion to compel, I think we've

1 already hashed out the substantive points in the context of the  
2 argument on the motion for a stay. I would just reiterate  
3 today, to the extent that Google's opposition devotes some pages  
4 to arguing for the propriety of Google's conduct, that the  
5 Government is not arguing to the Court that Google has in any  
6 way acted improperly in this matter. The Government is not  
7 seeking sanctions against Google now, the Government is not  
8 seeking a contempt order now.

9                   The Government's contempt request would be only in the  
10 alternative, should the Court issue an order requiring the  
11 production of documents, and Google refusing to comply. I  
12 mention that only because Google mentioned several times their  
13 reasons for declining to produce the documents at various dates.  
14 I just want to make sure the Court understands that the  
15 Government is not asking the Court to go back and rule on the  
16 propriety of the past conduct.

17                   THE COURT: All right.

18                   MR. KRAVIS: With respect to--I would submit that the  
19 motion to compel should be granted for the same reasons that the  
20 motion for the temporary stay should be denied, which is that  
21 there's really just no lawful process that allows Mr. Benton to  
22 challenge the signed warrant before it has been executed.

23                   And because there is no such process available, and  
24 because we believe that Mr. Benton's motion on that point is  
25 frivolous and was correctly denied in a brief order by the

1 Court, that there is no reason why Google should not begin  
2 producing documents to the Government immediately. And the  
3 Government, of course, will adhere to procedures outlined in the  
4 opposition to the motion to quash the warrant.

5 With respect to the request for the protective order,  
6 I just wanted to make two brief points. The first is that our  
7 understanding is that the provision that is at issue here is a  
8 standard provision that the U.S. Attorney's Office for the  
9 Southern District of Iowa includes in all of its discovery  
10 orders in all of its criminal cases, and that that provision  
11 reflects a balance that has been struck in this jurisdiction  
12 between, on the one hand, the Government's concern with  
13 restricted access to the most sensitive materials that are  
14 produced in discovery, and on the other hand the defendants'  
15 need to prepare adequately for their defense. And our  
16 understanding is that it is the practice of all of the judges in  
17 the district who routinely sign such orders in criminal cases.

18 And the second point I wanted to make about this was  
19 just that Mr. Benton suggests--or I guess all the defendants  
20 suggest in their oppositions to the motion, that the  
21 Government's reason for seeking the motion is just a concern  
22 with our reputation, that somehow we'll get blamed for any leaks  
23 of the materials that may occur, and that we're concerned about  
24 protecting our good name. But that is not the Government's  
25 concern here.

1           Our concern, rather, is that witnesses who testify  
2 before the Grand Jury and who are interviewed by the FBI are  
3 entitled to a sensitive handling of the materials that are  
4 produced arising out of those interviews and Grand Jury  
5 appearances. And it is unfair to those witnesses to create a  
6 substantial risk that those materials, materials related to  
7 their interviews and testimony, will be leaked to the public in  
8 advance of a trial.

9           Leaks also taint the jury pool and make it more  
10 difficult for everyone to obtain a fair and impartial jury for  
11 this criminal trial. And I believe that the evidence that we  
12 submitted under seal on Friday shows that in this particular  
13 case, the concern about leaks of sensitive material is  
14 justified, and that the threats to leak information that the  
15 Government learned of during this investigation were not, as the  
16 defendants would have it, kind of spur-of-the-moment, angry  
17 responses in the heat of a political campaign, but were, rather,  
18 deliberate and thought--a well-thought-through plan that showed  
19 that the defendants in this case are willing to leak sensitive  
20 materials when it will advance their interests to do it. And  
21 that's why this standard discovery provision is particularly  
22 appropriate in this case.

23           THE COURT: All right. Thank you.

24           My suggestion would be either Mr. Howard or Mr. Cook,  
25 one of you go next.

1                   MR. COOK: Your Honor, this is Guy Cook. I'm happy to  
2 go next--

3                   THE COURT: Why don't you.

4                   MR. COOK: --on behalf of Google.

5                   We filed last week a resistance to the Government's  
6 motion to compel production and the show cause on contempt both  
7 in the miscellaneous civil action, where this Court's order  
8 issued from on August 10th, and in the criminal action, where  
9 the Government filed its motion to compel. So we have that on  
10 file in both actions.

11                  It's important to note, of course, that already the  
12 Government has acknowledged that Google has done nothing wrong  
13 or improper here, and that they're not now seeking sanctions or  
14 contempt actions against Google. Google respects the Court's  
15 ruling and order of August 10th on Defendant Benton's motion to  
16 quash, but the time line here is important to understand the  
17 context.

18                  Following the ruling, Google was advised by Defendant  
19 Benton's counsel that Defendant Benton intended to seek relief  
20 from the order, which the Court's aware of and has been already  
21 argued. Google advised the Government that it plans to await  
22 the outcome of such relief before producing the information.  
23 You'll see that in the declaration of Attorney Randy Tyler  
24 that's attached to our resistance which we filed last week.

25                  On the 11th of August, the Government advised via

1 voice mail that absent a motion to stay by Defendant Benton, the  
2 Government would file a motion to compel. Of course we now know  
3 that the next day, on August 12th, Defendant Benton filed a  
4 motion to seek temporary relief, staying execution of this  
5 Court's order of August 10th, so an appeal could be taken by  
6 Defendant Benton.

7           Then on the next day, in spite of that motion for  
8 relief, the Government then filed its motion to compel and to  
9 show cause on why Google should not be held in contempt.

10           As has been identified already in this record, and the  
11 Court's aware, Defendant Benton has 14 days under Rule 59 to  
12 seek relief from the August 10th order, and that would be seven  
13 days from today, or August 24th.

14           All that Google was saying here, Your Honor, in our  
15 resistance and our attachments is it is reasonable to wait until  
16 those seven days pass before producing information, and to do  
17 otherwise would short circuit Defendant Benton's appeal.  
18 Meritorious or not, it should be allowed to go forward.

19           And to appreciate, by way of context further, the  
20 issue of the warrant and motion to quash was briefed by the  
21 Government and Defendant Benton many months ago, and was pending  
22 since September 14th. The warrant is in July, the motion to  
23 quash was in September. There was no action for about eight  
24 months, and then there was a hearing held on June 4th of this  
25 year.

1                   And so it would seem reasonable to Google that seven  
2 days more would not prejudice any party to allow Defendant  
3 Benton's appeal and to protect Google from any claims of short  
4 circuiting the legal process.

5                   Google has acted in good faith, honorably throughout  
6 the circumstances here, and is not in defiance of the Court's  
7 order.

8                   Thank you, Your Honor.

9                   THE COURT: Mr. Cook, the only comment that I would  
10 make is we're really talking about more than seven days. In the  
11 grand scheme of things it's not huge, but seven days would get  
12 the appeal on file. But then the Government would have an  
13 opportunity to respond to that, and then we'll be waiting for  
14 the ultimate ruling from the District Court Judge.

15                   So is it Google's position that they should--we should  
16 wait that full period of time? In essence, they want a ruling  
17 on the appeal? Is that what I'm understanding?

18                   MR. COOK: Yes, Your Honor, that is Google's position,  
19 that until there has been a final decision on this by the  
20 District Court, that it would be--Google should not be in a  
21 position to short circuit the legal rights that Defendant Benton  
22 has.

23                   THE COURT: All right. Thank you. And, Mr. Cook, one  
24 more question. Do you have a sense, once everything is  
25 resolved, or once Google is given the order from the Court,

1 whenever that might be, whether now or later to produce, do you  
2 have a sense how long that would take?

3 MR. COOK: I would defer to my co-counsel, John Roche,  
4 who has a motion for pro hac vice pending. He can answer that,  
5 Your Honor.

6 THE COURT: Okay. Thank you.

7 MR. ROACH: Good morning, Your Honor. This is  
8 Mr. Roche. I think Google can act expeditiously once it's  
9 determined this matter has come to a close. We would have to  
10 assess the procedural posture, whatever the further order is  
11 that gets entered, but Google can produce relatively quickly  
12 once the production is deemed appropriate.

13 THE COURT: And, Mr. Roche, let me just ask you, and I  
14 don't--I'm not trying to tie you down, but can you give me a  
15 sense of are we talking a week? Are we talking longer than  
16 that? What's your sense about that?

17 MR. ROACH: I would not think--once a decision is made  
18 that production is appropriate, it would not take more than a  
19 week.

20 THE COURT: Okay. Thank you. That's helpful. All  
21 right.

22 Mr. Howard, do you want to respond to either or both  
23 of the motions from the Government?

24 MR. HOWARD: Your Honor, I will certainly stand by  
25 Google's representations. We don't have anything to add to

1 that.

2 I'm happy to respond to the protective order. I don't  
3 know if Mr. Warrington or Mr. Binnall wanted to add, but I'd  
4 certainly like to just start there, if that's okay with the  
5 Court.

6 THE COURT: That's okay. Go ahead.

7 MR. HOWARD: Your Honor, first of all, I want to point  
8 out that we have spoken on at least two occasions--I've spoken  
9 once, I know the group has spoken at least twice--with  
10 Mr. Kravis and Mr. Pilger about this protective order, and I  
11 will tell you that the overwhelming theme was that they're  
12 worried they get blamed for leaks. This is about their  
13 reputation. They can deny it now, but that's exactly what they  
14 told us during our meetings with them. They keep pointing to  
15 Mr. Benton and the others, and what they're saying is their  
16 willingness to leak things.

17 First of all, I mean, they--we were told--and I don't  
18 have the exact wording--that they didn't trust our clients, and  
19 I'm not going to tell them who they should trust, but Mr. Benton  
20 does have a presumption of innocence. We think that that should  
21 be credited here.

22 And, you know, they have indicated that there are  
23 e-mails that they're showing from the heat of a presidential  
24 campaign in 2012, and they point that out as somebody's  
25 willingness to leak information. Your Honor, they're simply

1 apples and oranges.

2 You're talking about competent citizens of this  
3 country, one, doing their jobs. I mean, as everybody knows,  
4 especially in Iowa, the presidential campaign is all about the  
5 media, it's nothing else, versus whether Mr. Benton, Mr. Tate,  
6 and Mr. Kesari can follow a court order, which is wholly  
7 different.

8 We think that the things that are in place in the  
9 Southern District of Iowa now are more than adequate.  
10 Mr. Benton certainly can be ordered not to have contact with the  
11 press. He is actually under that direction now from counsel.  
12 But for them to compare them doing their jobs--like it or not,  
13 that's what the job is--versus their ability to follow your  
14 orders, or anybody else's orders once a trial starts, are just  
15 apples and oranges. And to make that kind of comparison is  
16 beyond unfair.

17 The other thing I'll point out is that for all of  
18 their talk about the sensitivity of this material, what they do  
19 is in their order. And what I hear Mr. Kravis saying now is  
20 that it was done in a secret place, that's the Grand Jury, or it  
21 was done in a sensitive manner, and those are the law  
22 enforcement memos.

23 What they don't say is what the material is. And I  
24 will just make a representation that the Grand Jury obviously  
25 results in an indictment. I have read through the indictment, I

1 have listened to the Department of Justice's press conferences,  
2 and, quite frankly, there is simply nothing in any of the  
3 material that is sensitive, not in the way that Rule 16  
4 considers it.

5 They have not presented anything for review by this  
6 Court, they have not made one representation either at this  
7 hearing or at our--or in their filings to say one thing about  
8 one piece or document that they consider overly sensitive. And  
9 I will--I would even go so far as to suggest that whatever they  
10 talk about is already out in the public, it's out here.

11 And the final thing I'll say, Your Honor, this is  
12 really about our Sixth Amendment--our client's Sixth Amendment  
13 right to counsel. I will point out that, as you know, we're in  
14 Washington, D.C. Mr. Benton is in Louisville, Kentucky. He has  
15 had to resign his job because of this matter. So he does not  
16 have a source of income as we're doing it right now.

17 The only way we can communicate with him is through,  
18 obviously, e-mails, telephone, and for him to have copies of the  
19 things that we need him to review. And for the Government to  
20 now--and, Your Honor, I'm just going to digress. For them to  
21 say that it's a particular matter that's usually in protective  
22 orders is simply not a reason to keep it in.

23 In this case, Mr. Benton would be unbelievably  
24 prejudiced if we weren't able to give him copies of things. He  
25 needs to, as the Constitution provides, he needs to be able to

1 see who his accusers are and what they say so we can come up  
2 with our defense, and we understand what it is the Government is  
3 trying to prove, and we can understand it.

4 For them to say that we can't give him copies of what  
5 we are looking at so that we can have meaningful discussions  
6 over hundreds of miles of distance, it's as unfair as I've seen.  
7 It makes no sense. And, Your Honor, there is nothing in any of  
8 these materials, nothing in anything they've given us, nothing  
9 that they have said, as a matter of fact they've said nothing,  
10 that would indicate there is anything that would even approach  
11 being sensitive.

12 In terms of how their witnesses should be treated,  
13 that's not the issue, Your Honor. The Constitution is all about  
14 the defendant, and he's got a right to protect himself. These  
15 witnesses, when they go into the Grand Jury, presumably they are  
16 told exactly how these things pan out. Mr. Benton has no  
17 intention of telling anybody about this. It certainly doesn't  
18 work to his favor, and he's got no intention of leaking or  
19 talking to the press. We'll make that representation.

20 And my suggestion is, instead of this onerous section,  
21 that an order to that effect to each one of the defendants be  
22 issued as opposed to keeping him from being able to take his  
23 time, review the materials that the Government has alleged  
24 are--make up a crime.

25 And, Your Honor, I mean, I don't know how we could do

1 it if you were to enter this order. I mean, he can't afford to  
2 fly us to Louisville on a regular basis, he's not going to come  
3 here on a regular basis. And, obviously, you know, the internet  
4 and everything makes our jobs a lot easier. But for him not to  
5 have copies of things that we are reviewing would be a real  
6 violation of his Sixth Amendment right.

7 THE COURT: And, Mr. Howard, can you tell me, we're  
8 talking about witness testimony?

9 MR. HOWARD: Yes.

10 THE COURT: What else falls within that category, that  
11 you're aware of, that you believe is out there?

12 MR. HOWARD: Well, I can ask Mr. Kravis. I think it's  
13 witness--its in their protective order. Let me see if I can  
14 find it real quick.

15 THE COURT: Okay.

16 MR. HOWARD: It's witness testimony and 302s, I think  
17 are the categories. I believe that Mr.--yeah. I think he took  
18 out--I think he took out exhibits, but they're law enforcement  
19 reports and Grand Jury testimony--law enforcement reports,  
20 investigative reports, witness statements, memoranda of witness  
21 interviews, audio recordings, video recordings, and Grand Jury  
22 testimony is what we understand is included.

23 THE COURT: Mr. Kravis, do you agree that's what we're  
24 talking about?

25 MR. KRAVIS: Yes. There's one additional--with one

1 addition. There are some handwritten notes of the agents from  
2 the witness interviews, and those would fall in the same  
3 category.

4 And, of course, our understanding is that the standard  
5 order in this jurisdiction includes Grand Jury exhibits. And in  
6 this case we agreed to remove the Grand Jury exhibits from the  
7 order because many of the documents the Government intends to  
8 introduce at trial were introduced in the Grand Jury as  
9 exhibits, and we did not want the defense lawyers to be in a  
10 position of having to check the Grand Jury record every time  
11 they wanted to give their clients a copy of a key document in  
12 the case.

13 THE COURT: All right. Thank you.

14 And thank you, Mr. Howard.

15 Mr. Warrington, anything additional you wanted to add?

16 MR. WARRINGTON: Yes, I would like to, Your Honor.

17 The Government's position--I'd like to adopt Mr. Howard's  
18 representation, but the Government's position seems to be  
19 two-fold in that there's some boilerplate language in the order  
20 that has been adopted and used frequently in this district that  
21 should be acceptable for all purposes. However, I would just  
22 point out that boilerplate language ought not trump the  
23 individual's Sixth Amendment right to counsel.

24 And the Government then argued that these are--the  
25 witnesses are entitled to have their interviews handled--

1 because it's sensitive information, and it would be unfair to  
2 those witnesses.

3                   As Mr. Howard correctly pointed out, the issue is not  
4 unfairness to witnesses. It is the constitutional rights of the  
5 defendants here in this matter. So the fact that the witnesses'  
6 information is shared with the defendants, as they prepare their  
7 defense to these charges, should clearly be outweighed by the  
8 constitutional rights of the defendants here.

9                   And I will make one final point. The Government has  
10 represented that these supposed or anticipated leaks that they  
11 claim are a danger if this order is not entered would taint the  
12 jury pool, yet the very first act that the Government undertook  
13 here in this case is to issue a press release once the  
14 indictments were handed down that referenced material that was  
15 discussed out of context, material that was discussed in the  
16 Grand Jury.

17                   So if they are worried about materials being sensitive  
18 and being put in the press, their own press office has already  
19 done that. So it is really galling to see that they are now  
20 standing and saying that because there's a perception that these  
21 political operatives, the defendants, might leak something to  
22 the press, when they've already done it, is really not the case  
23 here.

24                   And it also, as Mr. Howard said, mixes apples and  
25 oranges because we're talking about the rough and tumble world

1 of a political campaign versus the proceedings in a criminal  
2 matter before a federal judge. I think our clients are  
3 sophisticated enough to understand that, they are ably  
4 represented by counsel, they will be properly instructed, and  
5 they will obey the orders of the Court.

6 But to have an order entered that prohibits them from  
7 having materials given to them so that they may effectively  
8 participate in their defense is a clear violation of their  
9 constitutional rights, and we think--that's why we oppose it.

10 THE COURT: Mr. Warrington, do you have the same  
11 situation with Mr. Tate, from a geographic perspective, that  
12 Mr. Howard has regarding his client?

13 MR. WARRINGTON: It's not as dramatic as Mr. Howard  
14 and Mr. Benton, the distance between the two. But Mr. Tate  
15 lives approximately 45 to 50 miles outside of Washington, D.C.,  
16 and is employed in an area that's about ten miles closer to DC.  
17 So he's 35 miles away, and he clearly would not be able to drop  
18 everything every time I needed to speak with him regarding a  
19 document and come to Alexandria, nor could I drop everything and  
20 drive out to Warrenton, Virginia, to do the same thing with him.

21 The convenience of being able to send an e-mail  
22 containing material that we would like to discuss in the course  
23 of preparing our defense certainly makes it a lot easier. If we  
24 are prohibited from doing that, it adds a real burden on  
25 Mr. Tate's ability to effectively render assistance in his own

1 defense.

2 THE COURT: Two more questions for you,  
3 Mr. Warrington. The first one is do you agree with Mr. Howard's  
4 position that a better avenue would be for the Court to enter an  
5 order specifically telling each of the defendants that they're  
6 not to have conversations with the media, et cetera?

7 MR. WARRINGTON: Your Honor, yes, we would agree with  
8 that. In fact, as Mr. Benton noted, I think it's pretty clear  
9 that each of the defendants have been counseled in that regard,  
10 and we would have no objection to an order limiting the contact  
11 with the press.

12 THE COURT: All right. And I have one more question  
13 for you, and I will also give Mr. Kravis and Mr. Howard an  
14 opportunity to respond to this.

15 My question is this: If the parties--if counsel is  
16 going to supply certain of these materials to their clients, and  
17 if the Court were to allow that, is there a concern about  
18 allowing that via e-mail, or are those e-mails going to be in  
19 some way encrypted, or is there sufficient security around that  
20 e-mail exchange?

21 MR. WARRINGTON: Your Honor, as I understand it right  
22 now, and I have to admit that I am not the technical guru from  
23 my law firm, but if the Court would require a secure e-mail  
24 exchange, I'm sure we have an ability to do that within our  
25 electronic communications systems here at our firm. I suspect

1 the other counsel have that ability as well.

2 My general practice, absent certain other facts in  
3 other cases that I handle, would be to communicate via the  
4 regular chains of e-mail between our firm and our clients  
5 without any extra level of encryption. However, I think we do  
6 have that capability, should that be required by the Court.

7 THE COURT: All right. Thank you, Mr. Warrington.

8 MR. WARRINGTON: Your Honor, if I may, I have one  
9 little appendage to that. If there is--it's something  
10 Mr. Howard brought up. The Government really hasn't pointed out  
11 to any degree of specificity what sensitive material that they  
12 don't want our clients to have copies of. If--I'm certain we  
13 would be willing to work with counsel, work with the Government,  
14 if there is something that rises to the level of gravely  
15 sensitive information that would warrant such protection. I  
16 just don't know of it in this case, and I do not think that the  
17 blanket assertion that certain materials are just ipso facto  
18 sensitive would warrant the limitation on our clients' ability  
19 to participate in their defense.

20 THE COURT: Okay. Thank you.

21 Mr. Howard, I'm going to let you respond to that issue  
22 as well, and then I will give Mr. Binnall an opportunity to  
23 provide any additional comments he wants to make on behalf of  
24 his client, Mr. Kesari, and then I will go back to Mr. Kravis.

25 So if you want to go ahead and respond, Mr. Howard.

1                   MR. HOWARD: Thank you, Your Honor. First of all, we  
2 don't have any indication in our law firm, Barnes & Thornburg,  
3 that we've had any issue with anything being hacked, or anybody  
4 trying to get in.

5                   All that being said, we're happy to follow any court  
6 order or take any precaution. We can send things through  
7 secured password-coded devices, or send Mr. Benton a CD with the  
8 materials and that way it would get to him through--via FedEx or  
9 a courier, he'd get it on a CD, and then he'd load it. So there  
10 wouldn't be any concern of somebody hacking, you know--stealing  
11 a--any communication between our office and him.

12                  We understand the concern. We haven't had any of that  
13 pop up. We do have fairly sophisticated IT people here, and we  
14 can easily come up with a way to transfer material, either  
15 through, you know, a hard copy and a CD, or through a more  
16 secure e-mail exchange with a file that's password coded, or  
17 something to that effect.

18                  THE COURT: All right. Thank you, Mr. Howard.

19                  Mr. Binnall, anything additional that you wanted to  
20 say on behalf of your client? And also, if you could address  
21 that issue for me as well?

22                  MR. BINNALL: Yes, Your Honor. And very briefly, we  
23 join I think the very good arguments made by Mr. Howard and  
24 Mr. Warrington.

25                  The only thing that I'll add in there, Your Honor, is

1 that it's going to be very prejudicial for my client, who  
2 doesn't have counsel paid for just as staff--he has counsel paid  
3 on a retainer, an hourly basis--to have to have the lawyers  
4 watching over him as he goes through and looks over these  
5 documents; that he should be able to do--to help prepare in his  
6 defense on his own time, and not necessarily at times that are  
7 available to counsel, and not necessarily paying his lawyers to  
8 sit there with him to go through all the documents. That's  
9 something that would be very prejudicial, specifically to my  
10 client.

11           Regarding the security aspect, Your Honor, it's my  
12 understanding from the discovery that we received--right now it  
13 didn't come to us in an encrypted form. It came to us in a  
14 password-protected form, and that we would be able to duplicate  
15 that security in sending it to our client, whether we sent it in  
16 documents that were password protected, which we have the  
17 capability to do, or if we sent a hard copy by--well, I mean, a  
18 CD directly to our client, and then separately sent them the  
19 password to open that CD.

20           If the Court really believed it needed to be through  
21 some sort of encrypted means, we could find the capability to do  
22 that, and--although I believe that's a little bit more onerous  
23 than the manner that we've been provided these documents, which  
24 is just password protected.

25           So for those reasons we join in everything that my

1       colleagues have said, and that we ask that we are able to send  
2       copies of these documents to Mr. Kesari.

3               THE COURT: Also, can you tell me from a geographic  
4       standpoint, do you have a similar situation to Mr. Howard, or  
5       more like Mr. Warrington's situation with Mr. Tate?

6               MR. BINNALL: It's very similar to Mr. Warrington's  
7       situation with Mr. Tate. It's not airplane flights in order for  
8       my client to get here, but I certainly can't drop everything on  
9       a whim and go up to Loudoun County, Virginia; and it's difficult  
10      for him, who is, because of all of this, having a difficult time  
11      making ends meet, to just come here on a whim as well.

12               So for those reasons it would be much easier for him  
13      to be able to review these documents on his own time with the  
14      understanding--a court order saying that he cannot disclose any  
15      of this information to the press, and that he can't have any  
16      contact from here on out with the press.

17               THE COURT: All right. Thank you.

18               Mr. Kravis, I indicated I'd come back around to you.  
19      And if you could, in your final comments also respond to the  
20      question I raised about the e-mail communication, and anything  
21      else you wanted to add, I would appreciate it.

22               MR. KRAVIS: Yes. Thank you, Your Honor. I just  
23      wanted to make two brief points, and then I'll address the  
24      e-mail communication.

25               The first is on the motion to compel. I think I heard

1 counsel for Google say that Google would be prepared to produce  
2 documents within a week to the Government. The Government's  
3 position--and I've talked to Google's counsel about this last  
4 week before the hearing--is that Google should be gathering  
5 these documents now so that they are able to produce them to the  
6 Government the next business day after the Court orders their  
7 production. I know a week doesn't sound like a very long time,  
8 but there are only seven of them between now and our first trial  
9 date.

10           In addition, the processing time for Google does not  
11 account for the fact that the Government will have to process  
12 the documents once they're received. We will have an obligation  
13 to do a search for any potentially privileged material, and  
14 we'll be obligated under the terms of the warrant to search for  
15 responsive documents, and to produce only non-privileged  
16 responsive documents in discovery to the other defendants. And  
17 so that will take some time, and we are preparing to do that as  
18 quickly as we can, as quickly as our information technology  
19 section will allow us, but it will take some time and every day  
20 will count.

21           And at this point the warrant has been in Google's  
22 possession for over a year, and we're not, again, arguing about  
23 the propriety or impropriety of their conduct up to this point,  
24 but at a minimum, Google should be able to gather these  
25 documents. These documents should already be gathered. If

1 they're not, they should be gathered right now so we can get  
2 them right away because there's really no reason to delay the  
3 litigation a week for Google to gather them.

4 On the discovery motion, the only thing I wanted to  
5 add here is the Government has attempted to narrowly tailor  
6 their request in this case. As I mentioned a moment ago, we  
7 removed Grand Jury exhibits from the list of restricted  
8 materials so that the defendants would be able to have copies of  
9 the key documents in the case. The materials that we're talking  
10 about are the Grand Jury transcripts, the witness statements,  
11 and the notes of the witness statements. Everything else the  
12 defendants would be allowed to have copies of. And, of course,  
13 the defendants would be allowed to review those materials with  
14 their lawyers or the investigators.

15 And so I think that--just to respond to the point that  
16 all defendants have made about the burden on their ability to  
17 prepare for trial, the Government has attempted to tailor its  
18 request as narrowly as possible to try to get down to the core,  
19 sort of, sensitive materials in the discovery.

20 With respect to the point that the Court raised about  
21 communications via e-mail, the Government agrees that if the  
22 Court were to allow the defense to provide copies of Grand Jury  
23 transcripts, reports of witness interviews, and notes of those  
24 interviews to the defendants themselves, that they should be  
25 required to do so in a way that preserves the security of those

1 documents.

2 I think the concern is not so much the servers of the  
3 law firms themselves as the vulnerability of whatever accounts  
4 the defendants themselves are using. If they're using a gmail  
5 account--no offense to Google counsel on the phone--or an AOL  
6 account, or something like that, that defense lawyers be ordered  
7 to take steps to make sure that the documents are secure, and  
8 that--I think the best way to do that is probably deliver them  
9 on a CD or thumb drive rather than communicate by e-mail, but  
10 there are ways to secure e-mail.

11 Since the Court raised the point of the security of  
12 e-mail, I just wanted to add one housekeeping matter with  
13 respect to the motion to quash the warrant. The parties  
14 throughout the litigation have been putting the gmail address at  
15 issue in the pleadings, which are now in the public record. I  
16 believe--except for Google. I believe Google did not do that.

17 I have seen this done both ways. I've seen cases  
18 where the e-mail address itself is actually reported as a matter  
19 of public record, and I've also seen cases where the e-mail  
20 account is redacted. The Government, obviously, has no position  
21 on this. I just wanted to raise with the Court that if  
22 Mr. Benton would like the e-mail address at issue redacted from  
23 the public record, we would be happy to file redacted versions  
24 of our pleadings that can replace the ones that are currently on  
25 the public docket.

1                   THE COURT: Okay. Thank you.

2                   Mr. Howard, what's your position on that?

3                   MR. HOWARD: Your Honor, having Mr. Benton's e-mail  
4 address redacted would be preferable for us. We thank the  
5 Government for that, yes.

6                   THE COURT: All right. So what we'll need to do,  
7 then, is to the extent that anybody's put that into their  
8 pleadings, you'll have to file a redacted version of that. I  
9 will let the clerk's office know that is something that will be  
10 happening so they're watching for it.

11                  MR. HOWARD: Thank you, Your Honor.

12                  MR. KRAVIS: Thank you.

13                  THE COURT: Okay. Thank you all very much for your  
14 time this morning. That's all the questions--specific questions  
15 that I had, and I did want to allow you all an opportunity to  
16 make a full record with respect to the issues. I would imagine  
17 that some or all of them may get revisited beyond my handling of  
18 them.

19                  I'm going to take them all under advisement at this  
20 time, and we'll be working on a ruling with respect to all three  
21 of the motions so that we can get those out.

22                  I also will let--I don't know which of the district  
23 judges will get the appeal. I assume it will likely be Judge  
24 Jarvey, since the criminal case has been sent to him. So I  
25 assume that what will happen is anything that comes out of that

1       miscellaneous case that was the original matter on the warrant  
2       will go to Judge Jarvey as well. And I'll double-check that  
3       with the clerk's office, but I think that probably makes the  
4       most sense. All right?

5            MR. HOWARD: Thank you, Your Honor.

6            MR. KRAVIS: Thank you, Your Honor.

7            MR. COOK: Thank you, Your Honor.

8            THE COURT: Thank you all for your time.

9            MS. SINFELT: Your Honor, we had one quick question.  
10       This is Meena Sinfelt for Defendant Benton.

11           THE COURT: Yes.

12           MS. SINFELT: We've noticed that the miscellaneous  
13       matter has been closed. And so to the extent there are more  
14       filings, obviously, on our appeal, should we be filing that  
15       under the criminal matter?

16           THE COURT: I think you can still file under the  
17       miscellaneous matter, even though--it's kind of a back room  
18       administrative closure for us so that it's clear that the two go  
19       together. But I understand, and I have someone from the clerk's  
20       office here with me, and you should still be able to file your  
21       appeal in that matter.

22           MS. SINFELT: Okay.

23           THE COURT: Okay. If you have any problems with that,  
24       you can contact the clerk's office here in the Southern  
25       District, but my understanding is you should still be able to

1 file those types of matters in that case.

2 MS. SINFELT: Okay. Thank you, Your Honor.

3 THE COURT: You're welcome.

4 MR. HOWARD: Thank you, Your Honor.

5 MR. WARRINGTON: Thank you, Your Honor.

6 MR. BINNALL: Thanks, Judge.

7 MR. COOK: Thanks, Judge.

8 THE COURT: Bye-bye.

9 MR. KRAVIS: Thanks.

10 (Proceedings concluded at 11:30 a.m.)

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## 1 C E R T I F I C A T E

2 I, the undersigned, a Certified Shorthand Reporter of  
3 the State of Iowa, do hereby certify that I acted as the  
4 official court reporter at the hearing in the above-entitled  
5 matter at the time and place indicated;

6 That I took in shorthand all of the proceedings had at  
7 the said time and place and that said shorthand notes were  
8 reduced to typewriting under my direction and supervision, and  
9 that the foregoing typewritten pages are a full and complete  
10 transcript of the shorthand notes so taken.

11 Dated at Des Moines, Iowa, this 27th day of August,  
12 2015.

13  
14  
15 /s/ Theresa Kenkel  
16 CERTIFIED SHORTHAND REPORTER  
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